

Decision 06-03-004 March 2, 2006

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking Regarding the
Implementation of the Suspension of Direct
Access Pursuant to Assembly Bill 1X and
Decision 01-09-060.

Rulemaking 02-01-011
(Filed January 9, 2002)

**OPINION ESTABLISHING PROCEDURES TO SEEK
EXEMPTION ELIGIBILITY**

I. Background

This order establishes procedures for publicly-owned utilities (POUs)¹ to be added to the list of entities eligible to apply for exemption from the Municipal Departing Load (MDL) Cost Responsibility Surcharges (CRS) on behalf of their customers as authorized by Decision (D.) 04-11-014. In D.04-11-014, the Commission adopted eligibility criteria for existing POUs whose customers may qualify for the limited CRS exemption applicable to “transferred load”² as discussed in that order. For customers of a POU to qualify for this CRS exemption, the POU had to be providing electricity to 100 or more retail end use customers as of July 10, 2003. In D.04-11-014, the Commission established an

¹ As used in this order, the term “publicly-owned utility” refers to entities is defined in Pub. Util. Code § 9604(d).

² “Transferred load,” as referenced in D.04-11-014, is customer load that was originally served by an investor-owned utility (IOU, but that was subsequently transferred to a publicly-owned utility (POU).

initial list of POU's that satisfied the criteria for the CRS exemption. The Commission recognized, however, that in addition to the list of POU's identified in D.04-11-014, there could be additional POU's that met the CRS exemption criteria. Accordingly, the Commission indicated that in addition to those POU's that were specifically identified, other POU's could be added to the CRS exemption eligibility list based on a demonstration that they meet the criteria in D.04-11-014. In Ordering Paragraph 12 of D.04-11-014, the Commission stated that any entity seeking to be added to the list must submit evidence of its eligibility pursuant to procedures to be developed.

In reference to this matter, Hercules Municipal Utility (Hercules) filed a motion on September 29, 2005, requesting that the Commission develop and promulgate procedures for the determination of the CRS exemption pursuant to D.04-11-014. Hercules stated that development of such procedures would help to confirm the number of POU's that may qualify for the exemption. The number of POU's claiming the exemption, in turn, could affect the calculation of MDL charges or the allocation of the exemption. Hercules intends to request to be added to the eligibility list once the procedures to do so are adopted.

An Administrative Law Judge's (ALJ) ruling, issued on November 7, 2005, granted the motion of Hercules and solicited comments concerning the appropriate processes to identify and verify the POU's whose customers qualify for CRS customer exemptions under the criteria in D.04-11-014. Parties were also to address what documentation should be required to substantiate that a POU was providing electricity to at least 100 customers on or before July 10, 2003, in accordance with D.04-11-014.

Opening comments were filed on November 15, 2005, and reply comments were filed on November 22, 2005. Parties filing comments were Pacific Gas and

Electric Company (PG&E), Southern California Edison Company (SCE), City of Corona (Corona), Port of Stockton (Stockton), Hercules, and the California Municipal Utilities Association (CMUA).

II. Procedures for Establishing CRS Exemption Eligibility

A. Position of Parties

PG&E (with the support of SCE) proposes a procedure whereby any POU seeking to be added to the list of entities eligible for CRS exemption would provide informal written notification to the Commission's Energy Division and the affected IOU.

As evidence to support the claim of CRS exemption eligibility, PG&E proposes that the POU provide a list of customer accounts, including names and service addresses of the customers served, with their service start dates. To the extent that this information may be confidential, PG&E suggests that the POU could provide the list to the Energy Division under Section 583 and may redact customer names and addresses from the list provided to the IOU. The Energy Division would then be responsible for verifying that the POU meets the criteria established in D.04-11-014 and would provide written notice to the POU and affected IOU of its eligibility determination within 60 days of the POU request. In comments on the Draft Decision, PG&E suggests that if the Commission chooses not to require the POU to submit full customer lists, in the interests of minimizing burden, the POU could be required to submit a more limited list of just 100 customers.

If either the IOU or POU disagree with the Energy Division's determination, PG&E suggests that they be allowed to send a written notice to the Energy Division within 15 days of notification, with the reasons and

supporting justification to support any claim that the determination should be changed. PG&E proposes that any such requests for reconsideration be resolved by the Energy Division by written notice within a 30-day period. PG&E opposes any further opportunity for appeal of the Energy Division's eligibility determination.

Hercules, on the other hand, proposes that POUs seeking exemption eligibility file a formal motion, to be ruled upon by the assigned ALJ in this proceeding. The motion would include supporting evidence that POU was providing electricity to retail end-use customers on or before July 10, 2003, and serving 100 or more customers. Hercules proposes that the evidence consist only of a verified affidavit signed by an officer or authorized employee of the POU, attesting that the aforementioned eligibility criteria are met.

Hercules objects to a requirement that the POU provide customer list information to the investor-owned utilities. Hercules argues that the provision of such information is unnecessarily time consuming. Hercules argues even if the customer names and addresses were redacted, PG&E and SCE would still gain access to valuable business information that may not otherwise be lawfully obtained.

Hercules proposes that if the Commission believes further verification of a POU affidavit is warranted, the ALJ could direct that the Energy Division review or audit the information attested to in the affidavit. If Energy Division audit entails review of customer-specific information of the POU, Hercules proposes that such information be treated confidentially pursuant to General Order 66-C, and not available for public inspection.

Hercules also opposes PG&E's proposal to prohibit parties from appealing exemption eligibility determinations to the full Commission. Hercules

argues that in order to protect due process rights, a party should be permitted the normal rights afforded parties in Commission proceedings, and thus be permitted to appeal to the full Commission in the event that the party believes that an eligibility determination was improperly decided.

Stockton proposes a procedure to determine eligibility based on the system for determining Exempt Wholesale Generator (EWG) status established by section 711 of the Energy Policy Act of 1992 and FERC regulations thereunder.

As proposed by Stockton, an entity seeking exemption from CRS would file a sworn statement by a representative legally authorized to bind the entity attesting to any facts or representations presented to demonstrate eligibility for exemption from CRS (see, 18 CFR § 365.3). If the Commission has not issued an order granting or denying an application within 60 days of receipt of the application, the exemption would be automatically deemed granted (see, 18 CFR § 365.5).

Any party objecting to another entity's request for exemption would be permitted to make its views known to the Commission in the form of a sworn statement similar to that required of applicants, specifying the particular basis for the objection.

To avoid improper objections, however, Stockton proposes that any objections made for anticompetitive or other market manipulation reasons result in sanctions imposed by the Commission, to the extent permitted by law.

B. Discussion

We shall adopt the general process for establishing eligibility as proposed by Hercules. In D.04-11-014, the Commission stated that

“other publicly owned utilities may make a motion to the assigned ALJ to be added to the eligibility list based on a

demonstration that they meet the criteria we establish in this decision. The assigned ALJ may rule on the eligibility of any entity that makes such a motion, after verifying eligibility and considering comments from other interested parties. Any such motions should be served on all parties on the service list for R.02-01-011.” (D.04-11-014, at 48-49.)

Consistent with D.04-11-014, we shall therefore require that parties file formal motions in this proceeding seeking eligibility, rather than simply making an informal notice to the Commission’s Energy Division. A ruling granting or rejecting POU requests for exemption status shall be made by the assigned ALJ, based upon confirmation of whether the prescribed eligibility criteria are met.

We agree that it is not necessary for the POU, in its motion seeking to be added to the list of exempt POUs, to disclose the specific number of customers served as of July 10, 2003. As long as a POU verifies that it was serving at least 100 retail customers as of July 10, 2003, there is no necessity to require every POU to submit detailed information as to the specific number of customers served by the POU. Therefore, in order to safeguard the confidentiality of POU data and avoiding unnecessary burdens of compiling and submitting such data, we shall not require each POU to disclose specific customer totals. Instead, as supporting evidence of eligibility, we shall require only that a sworn affidavit from a responsible officer or employee be attached to the motion, affirming under penalty of perjury that the POU was providing electricity to 100 or more retail end use customers as of July 10, 2003. Each POU shall remain subject to possible audit by the Commission’s Energy Division, as deemed warranted, to verify the assertions contained in the POU affidavits.

Based on the process adopted herein, we serve notice that any POU seeking exemption eligibility pursuant to the criteria in D.04-11-014 shall file a motion in this proceeding within 10 business days following the effective date of

this order. The assigned ALJ shall then promptly issue a ruling either granting or denying eligibility.

If a party believes that the ruling on exemption eligibility has misapplied the criteria to the facts presented, the party may file a motion for reconsideration of the ruling within 10 business days of the effective date of the ruling, setting forth the reasons supporting the claim of error, together with any relevant factual documentation. Motions for reconsideration filed pursuant to this process are subject to the standard Rule 45 procedures applicable to motions generally.

III. Interpretation of the 100-Customer Criterion

Parties disagree over how to interpret the Commission's requirement that the POU must be serving at least 100 customers. In discussing the criteria under which customers of a POU may be eligible for a CRS exemption, we stated, in D.03-07-028, that qualifying POUs should have "substantial operations." In characterizing "substantial operations," we indicated that any POU only "serving minimal numbers of customers (e.g., under 100)" would not qualify. In D.04-11-014, we formally adopted a 100-customer minimum requirement, stating that a POU "must have been formed serving at least 100 customers as of July 10, 2003," in order to qualify for the CRS exemption.

The parties seek further clarification, however, concerning how to interpret the 100-customer criterion in determining whether a POU's customers qualify for a CRS exemption. We provide the requested clarification, as discussed below.

A. Customers Not Served by POU Distribution Facilities

1. Parties' Positions

SCE and PG&E interpret the 100-customer eligibility criterion to mean that the POU must be providing electricity to 100 or more customers as of

July 10, 2003, through the POU's own distribution facilities. SCE argues that the CRS exemptions were meant to apply to a POU only within its capacity as a POU, but not when acting in the capacity of an Energy Service Provider (ESP). Under this interpretation, a POU serving direct access (DA) customers in the role of an ESP could not use such customers to qualify under the 100-customer criterion. Such an interpretation would disqualify POUs such as City of Corona (Corona) from eligibility for the CRS exemption. Corona's customer base as of July 10, 2003, included a number of DA customers that were not served by POU distribution facilities. Corona sold electricity to such DA customers delivered through IOU distribution facilities.

PG&E argues that that the Commission criterion of "substantial operations" reasonably connotes the existence of a POU distribution infrastructure, not merely POU ownership of "scattered" meters connected to an IOU's distribution system.

Corona disagrees with PG&E and SCE, and argues that the 100-customer criteria should not be restricted to customers served through POU distribution facilities. Corona believes that its DA customers are properly included in the count of customers to determine if the 100-customer eligibility exemption criterion is satisfied.

Corona claims that the Commission did not intend to exclude DA customers served by the POU for purposes of determining if the 100-customer criterion was satisfied. In D.04-11-014, in defining "substantial operations" in terms of the number of customers served, the Commission specifically "decline[d] to add other criteria to this definition." (D.04-11-014 at 37.) Likewise, in discussing CRS exemption eligibility, the Commission stated that a POU must

meet the designated criteria “regardless of its customer base.” (D.04-12-059 at 30.)

Corona formed its POU utility on April 4, 2001, which was before DWR had made final adjustments to the load forecasts underlying its power purchase contracts. SCE expressly acknowledged that it was aware of the formation of Corona’s POU and the substantial effort being undertaken by Corona to implement its utility. For these reasons, CMUA argues that Corona should be found to have satisfied the conditions for CRS exemption.

2. Discussion

We conclude that PG&E and SCE are incorrect in interpreting the 100-customer criterion as requiring that the POU utilize its own distribution facilities to serve its customers. We conclude that in order to qualify as a “local POU,” as defined by Pub. Util. Code § 9604(d), the entity need not actually be furnishing electric service over its own or its members’ electric distribution system.

We disagree with SCE’s claim that § 9604(d) requires that all POUs, as defined thereunder, own transmission or distribution facilities. The definition in § 9604(d) referencing ownership of generation or transmission facilities applies only to a “joint powers authority.” We do not interpret the § 9604(d) reference to ownership of generation or transmission facilities, however, as a defining characteristic intended to apply to *all* POUs.

In D.04-11-014, the Commission viewed the 100-customer criterion as a sufficient measure of whether a POU had “substantial operations,” and declined to add other multiple criteria. In D.04-11-014, we stated:

We define “substantial operations” in terms of number of customers, and decline to add other criteria to this

definition. For example, PG&E suggests that the publicly-owned utility should establish that service to new customers within the IOU's service territory would not cause disproportionate expansion by the publicly-owned utility which could not reasonably have been considered by DWR, and SDG&E suggests adding other multiple criteria to the definition. However, an inquiry as to the number of customers strikes the balance as the best and most efficient way to insure against disproportionate expansion, because it is an objective test that does not require a mini-hearing for each publicly-owned utility claiming the exception.

In D.04-11-014, we thus rejected the arguments of PG&E, SCE, and SDG&E seeking to add more specific criteria to assess whether a POU had "substantial operations" for purposes of qualifying for CRS exemption eligibility. We stated that, in assessing whether a POU meets the 100-customer criterion under D.04-11-014, no distinction would be made among different categories of retail customers served. For example, either a residential or industrial customer with numerous submeters would be considered a single customer for purposes of counting toward the 100-customer test. (D.04-12-059 at 30-31.) Likewise, no distinction would be made between one large industrial customer versus a small residential customer. They would each be counted as one customer for purposes of the 100-customer criterion.

Accordingly, we find that no basis exists in D.04-11-014 to disqualify a POU from the CRS exemption merely because the retail customers that it serves may include DA. In D.02-12-027, we specifically stated that " '[R]etail end use customers' includes DA customers. DA customers purchase retail, as end-users, their electricity from energy service providers (ESPs) and their distribution and transmission services from the electrical corporation." (D.02-12-027, *slip op.* at 9.) Consistent with this definition, a POU may qualify for the CRS exemption

assuming that it served at least 100 retail customers as of July 10, 2003, even if some or all of such customers were served by the POU under a DA arrangement.

B. Treatment of Intermittent Vessels

1. Parties' Positions

Stockton proposes, for purposes of applying the 100-customer criterion, that customers be defined to include individual vessels that berth intermittently at the Port of Stockton, but that are not continuously present. Stockton argues that such vessels are analogous to a customer that may take protracted vacations, without discontinuing its commercial relationship with the utility or a customer may only have a seasonal use.

PG&E opposes Stockton's proposal to count each individual vessel that intermittently berths at the Port of Stockton as a separate customer in applying the 100-customer criterion. PG&E argues that while customers taking a vacation generally still have a meter in place and receive a monthly bill, such is not the case with individual vessels that berth intermittently.

2. Discussion

We agree with PG&E that the individual vessels that intermittently berth at the Port of Stockton do not constitute separate customers in counting toward the 100-customer criterion. Such vessels have no separate meters. Instead, the meter is associated with the berth, not the individual vessel.

Stockton may therefore count each individual metered berth as a single customer, but may not count multiple vessels as customers merely because they intermittently berth at a meter operated by the Port of Stockton.

C. Treatment of Customers Taking Service From Multiple Locations

1. Parties' Positions

Stockton requests that the Commission clarify that an end use retail customer at a separately read and billed meter³ should not be excluded from the definition of customer for the purpose of establishing eligibility for CRS exemption regardless whether that customer takes service at another separately metered location. PG&E agrees that under its tariffs, separately metered entities generally would have separate accounts and be treated as separate customers. Thus, if one franchisee owned five separately metered franchised establishments, PG&E would generally consider them to be five customers.

2. Discussion

We accept Stockton's proposal, and thus affirm that separately metered entities qualify as representing individual customers under the 100-customer criterion, even if the separately metered entities may be owned by a single entity such as a franchisee. We recognize that utilities often serve entities which take service at multiple, separately metered locations. For instance, separately metered McDonald's restaurants are treated as separate customers, even though one franchisee may own several such restaurants. We thus agree that it would be intrusive and unduly burdensome to attempt to determine affiliations among customers served at multiple metered locations within a POU's service territory.

³ Stockton is not requesting that customers with submeters be considered as more than one customer.

IV. Comments on Draft Decision

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. Comments were filed on February 21, 2006, and reply comments were filed on February 27, 2006. We have taken the comments into account as appropriate, in clarifying and finalizing this order.

In its comments on the Draft Decision, SCE argues that under Corona's interpretation, a city could qualify for an exemption by acting as an ESP and Meter Service Provider even if the qualifying customers were located in other states outside of California. We agree that in seeking to determine eligibility for the CRS exemption, it would make no sense to count out-of-state customers that would not be subject to Commission jurisdiction nor to the CRS in any event. It is not clear how likely it is that a city would attempt to include such customers in seeking to meet the 100-customer exemption criterion. In any event, in the interests of clarity on this point, we explicitly state that the 100 customer criterion used to meet the exemption eligibility refers to customers that are located within the service territory of the IOU in which CRS would otherwise apply.

V. Assignment of Proceeding

Geoffrey F. Brown is the Assigned Commissioner and Thomas R. Pulsifer is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. In D.04-11-014, the Commission adopted eligibility criteria for existing POU's whose customers qualify for the limited CRS exemption applicable to transferred load as adopted in that order.

2. For customers of a POU to qualify for this exemption, the POU must have been serving 100 or more retail end use customers as of July 10, 2003.

3. In D.04-11-014, the Commission prescribed a process for POU's to be added to the CRS exemption eligibility list by filing a motion in this proceeding, to be ruled upon by the assigned ALJ.

4. Consistent with D.04-11-014, any ruling on the eligibility of any entity that makes such a motion was to require verification of eligibility.

5. In D.04-11-014, in defining "substantial operations" in terms of qualifying under the 100-customer criterion as of July 10, 2003, declined to add other criteria to this definition.

6. While customers taking a vacation generally still have a meter in place and receive a monthly bill, such is not the case with individual vessels that berth intermittently at the Port of Stockton. Instead, the meter is associated with the berth, not the individual vessel.

7. Under PG&E's tariffs, separately metered entities generally have separate accounts and are treated as separate customers.

Conclusions of Law

1. The processes set forth in this decision should be adopted as the basis for POU's to initiate requests to be added to the CRS exemption eligibility list pursuant to D.04-11-014.

2. In order to be consistent with D.04-11-014, POU's should file their request for exemption eligibility in the form of a motion rather than by informal request to the Commission's Energy Division.

3. The POU should not be required to disclose specific customer count data in seeking CRS exemption eligibility, but should be required to provide a sworn affidavit from a responsible representative of the POU attesting that the POU served at least 100 retail customers as of July 10, 2003.

4. A POU submitting an affidavit attesting to CRS exemption eligibility should remain subject to possible audit by the Commission's Energy Division, as warranted, to verify the assertions contained in the affidavit.

5. For purposes of qualifying under the 100-customer criterion under D.04-11-014, a POU should be permitted to count any retail customer that it served as of July 10, 2003, irrespective of the category of customer involved, including direct access customers.

6. Individual metered berths at the Port of Stockton should count as a single customer, but multiple vessels should not count as customers merely because they intermittently berth at a meter operated by the Port of Stockton.

7. Separately metered accounts should qualify as representing individual customers under the 100-customer criterion, even if the separately metered accounts may be owned by a single entity such as a franchisee.

O R D E R

IT IS ORDERED that:

1. Publicly-owned utilities (POUs) seeking to be placed on the list of POUs whose customers are exempt from the payment of the Cost Responsibility Surcharges (CRS) shall file a motion in this docket pursuant to the processes adopted in this order. Such motions shall be filed within 10 business days following the effective date of this decision. As support for the motion, the POU shall include a sworn affidavit from a responsible officer or employee of the company, attesting that the POU was serving at least 100-retail customers as of July 10, 2003.

2. The Administrative Law Judge (ALJ) shall promptly issue a ruling either granting or denying the motions seeking to add POUs to the list eligible to apply for CRS exemption on behalf of their customers.

3. If a party believes that the ruling on exemption eligibility has misapplied the criteria to the facts presented, the party may file a motion for reconsideration of the ruling. Such motion must be filed no later than 10 business days of the ruling, and must set forth specific reasons supporting a claim of error, together with any relevant factual documentation. Motions for reconsideration filed pursuant to this process are subject to the standard Rule 45 procedures applicable to motions generally.

4. In attesting to the 100-customer requirement, the POU is authorized to count all retail customers served as of July 10, 2003, including Direct Access customers.

5. Vessels intermittently docking at the Port of Stockton shall not qualify as counting toward the 100-customer requirement, but individuals meters operated at the Port may qualify.

6. POUs submitting such motions shall make readily available to the Commission staff any supporting documentation that may be requested in the event that the staff determines to perform an audit to verify eligibility of the POU for the exemption. Any confidential data made available by the POU to Commission staff pursuant to such audit shall be subject to confidentiality protection pursuant to Pub. Util. Code § 583 and General Order 66-C.

This order is effective today.

Dated March 2, 2006, at San Francisco, California.

MICHAEL R. PEEVEY
President

GEOFFREY F. BROWN
DIAN M. GRUENEICH
JOHN A. BOHN
RACHELLE B. CHONG
Commissioners